

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matter of)
)
 Amendment of Section 73.202(b),) MM Docket No. 96-240
 Table of Allotments,) RM Nos. 8946, 9019
 FM Broadcast Stations.)
 (Lockport and Amherst, NY))

RECEIVED
 JAN 10 1997
 CC MAIL FILE

To: John A. Karousos, Chief, Allocations Branch, MMB

OPPOSITION TO PETITION FOR RECONSIDERATION

Kevin O'Kane ("O'Kane"), by his counsel, herewith submits his opposition to the PETITION FOR RECONSIDERATION filed by CULVER COMMUNICATIONS CORPORATION ("Culver") in the above-captioned proceeding. In support whereof, the following is stated:

1. As previously noted O'Kane was not represented by counsel at the time he filed his counterproposal in this proceeding. As a consequence his counterproposal was brief, albeit to the point. In its petition for reconsideration, Culver states: "O'Kane's minimalist Counterproposal included bare recitation of little more than two population statistics." Apparently Culver believes that the public interest standard should include an analysis of who filed the better legal pleadings – with the implication being that the public interest would not be served by awarding the allocation to a city where the party advocating said selection was not represented by legal counsel. The Commission, of course, does not make such decisions based on the quality of legal representation but on the merits of the communities which are the subject of the selection process.

2. Culver argues that because Amherst is in the Buffalo Urbanized Area, the Commission should presume that the proposed community of license would not be Amherst alone, but rather

the entire Buffalo Urbanized Area. (Petition at para. 5). Culver acknowledges that the cases cited apply to proposals to change community of license and are not applicable to the instant proceeding. However, Culver contends that the rationale of those cases should be extended to the instant case. No authority is cited for this proposition.

3. The Commission has made it clear that its concern in the cases involving a change of community of license is "the potential migration of stations from underserved rural areas to well-served urban areas." Amendment of Section 73.202(b) (Canovanas et al.), FCC 97-236, released July 2, 1997. Since that situation does not exist here, the rationale of those cases does not apply. Furthermore, as demonstrated in the Canovanas case, the Commission does not blindly "presume" that a community is not independent from the Urbanized Area. The Commission has stated that it will consider the following evidence in making its determination:

First, "signal population coverage" is examined. This refers to the degree to which the proposed station could provide service not only to the suburban community but also to the adjacent metropolis as well. Second, we examine the size of the suburban community relative to the adjacent city, its proximity to the city, and whether the suburban community is within or outside but proximate to the Urbanized Area, of the central city. Third, we determine the interdependence of the suburban community with the central city, looking at a wide range of evidence concerning work patterns, media services, opinions of suburban residents, community institutions, and community services. Headland, Alabama and Chattahoochee, Florida, 10 FCC Rcd at 10355.

Accordingly, the appropriate approach which Culver should have employed had it desired a change in Commission policy in this proceeding was to request the Commission to elicit evidence from the parties in accord with Headland.¹ Culver failed to request such an analysis with the required submission of pertinent evidence at the time comments were due on the

¹ Certainly no such change in legal precedent could be made without affording O'Kane an opportunity to demonstrate that Amherst is independent of Buffalo. In O'Kane's May 12, 1997 Petition for Leave to File Response and Response, O'Kane made such a showing. To the extent the Commission might consider Culver's

Counterproposal. Further, Culver has submitted no persuasive argument for making such a change at this late date. Culver's sole argument appears to be that there is "no basis" for not requiring the same showing in situations such as this. (Petition at f.n. 2). Of course, there is a basis, the Commission has articulated it as indicated above, and Culver has simply failed to demonstrate a basis for modifying the Commission's treatment of cases such as this.

4. Finally, Culver's comment in f.n. 4 of the petition misses the point completely. The Commission ruled that "first" local transmission service (under criterion 3) was not applicable because both communities already had a station licensed to them. The Commission considered provision of a "first nighttime and first competitive aural service" under "other public interest matters" (criterion 4). This ruling was to the benefit of Culver since these factors were not given the higher priority which applies to "first local transmission service" under criterion 3. Culver is wrong in stating that the Commission erred in this part of its analysis.

5. In summary, the Commission's order was well-reasoned and in accord with existing precedent. Culver argues for a change in the Commission's analysis of cases such as this, but Culver has presented no persuasive argument for a change in precedent. Moreover, an analysis of Amherst demonstrates that it is independent of Buffalo in any event, and the result would be the same regardless of whether the Commission were to change its analysis in this case.

WHEREFORE THE PREMISES CONSIDERED, it is respectfully requested that the Commission deny Culver's Petition for Reconsideration.

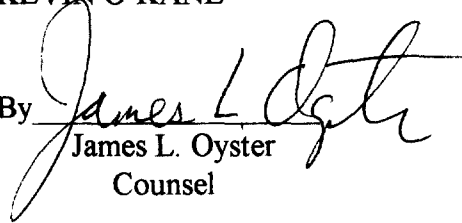
Respectfully submitted,

proposed change in law in this proceeding, that pleading is incorporated herein by reference to demonstrate that Amherst is independent from Buffalo.

Law Offices
JAMES L. OYSTER
108 Oyster Lane
Castleton, VA 22716
(540) 937-4800

January 13, 1998

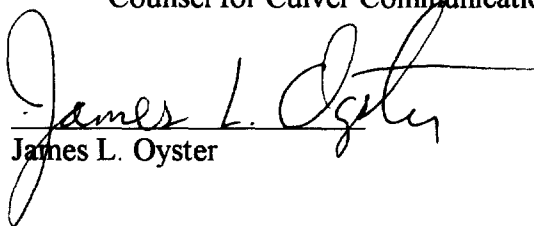
KEVIN O'KANE

By 
James L. Oyster
Counsel

CERTIFICATE OF SERVICE

James L. Oyster hereby certifies that he has sent a copy of the foregoing by first class U.S. mail, postage prepaid, or by hand delivery, on or before the 13th day of January, 1998, to the following:

Ann C. Farhat, Esq.
Bechtel & Cole Chartered
1901 L Street, N.W.
Suite 250
Washington, DC 20036
Counsel for Culver Communications Corporation


James L. Oyster